United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

J. W. ROBINSON, as Assignee of a Certain Judgment,
Appellant,
vs.
W. F. HAYS and W. M. RUSSELL,
Appellees.
No. 1861.

IN THE MATTER OF THE ESTABLISHMENT OF A CERTAIN LIEN CLAIM OF W. F. HAYS, ETC.

Motion to Dismiss Appeal

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REYNOLDS, BALLINGER & HUTSON,
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The Ivy Press, Second and Cherry, Seattle

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STATEMENT.

On the 6th day of June, 1910, W. F. Hays and W. M. Russell, by their respective solicitors, duly and properly served and filed the following motion to dismiss the appeal of J. W. Robinson in the above-entitled cause:

"Come now W. F. Hays and W. M. Russell and move the court to dismiss the appeal herein for the following reasons:

"1. It appears, upon the face of the record and supplemental record hereto, that the order appealed from has been in all things fully adopted by the appellant, and therefore he is thereby estopped from

appealing therefrom and his appeal is thereby waived.

"2. It appears from the record and the supplemental record herein that the order appealed from was obtained upon petition of the appellant, and that he is therefore bound by said order and the same is not appealable.

"This motion is based upon the records and files in this cause, especially upon the following record facts:

I.

"(a) The matter under consideration by the Circuit Court for the Western District of Washington was the distribution of certain costs awarded to respondent Marie Carrau in the above-entitled cause. On July 6, 1909, the said Circuit Court rendered its memorandum decision directing, among other things, that the sum of $1,500 and interest thereon be apportioned to W. M. Russell, and the surplus divided between W. F. Hays and J. W. Robinson. Said court further directed that 'Robinson shall have a right to control proceedings for collecting the judgment, as under the statute, if an execution is necessary, it must be issued in his name.' No formal order based upon said memorandum decision was signed and filed, but thereafter, on the 15th day of October, 1909, execution was issued as directed in said memorandum decision at the request of said J. W. Robinson, and said judgment for costs collected and placed in the registry of said court in pursuance of said request for execution. It is respectfully submitted that thereupon and thereby said J. W. Robinson accepted and adopted the direction of said memorandum decision and received the benefits thereof, and thereby waived his right to appeal from any part or from all said memorandum decision.

"(b) That thereafter, on the 10th day of May, 1910, and after the record of this appeal had been forwarded to this court, said J. W. Robinson requested and secured an order in this cause from the said Circuit Court permitting him to 'apply such portion of said funds now in the registry of the court belonging to the said J. W. Robinson as may be necessary from time to time to meet his expenses incident to said appeal and charge said fund with such amounts.' This order is before this court by means of a supplemental record, a copy of which order is also attached hereto and made a part hereof. It is respectfully submitted that this order is a complete adoption by said J. W. Robinson of the order distributing said funds, signed and filed on January 24, 1910, and an acceptance by him of the funds awarded to him by said Circuit Court in said order. and he cannot enjoy the benefit of said order and appeal thereon; that he is estopped by his own act.

II.

"That in January, 1910, said J. W. Robinson filed a petition in said Circuit Court requesting said Circuit Court to modify said memorandum decision of July 6, 1909. Said matter came regularly on for hearing and said Circuit Court in part granted said petition in this, to-wit: said Circuit Court required that certain witness fees referred to in said petition be paid and that the balance of said fund be distributed as directed in the court's memorandum decision of July 6th, 1909.

"Thereafter, on January 24, 1910, the order of distribution (the one now appealed from) was signed by said court and duly filed, distributing said funds in accordance with the decision as so modified.

"It is respectfully submitted, that such order as so modified was the result of appellant's own peti-

tion, and he is now estopped from appealing thereon."

On pages 4 and 5 of the record will be found the assignment of judgment for a consideration from Marie Carrau to J. W. Robinson, upon which the application of said Robinson for distribution thereof was based. It will be noticed that the assignment was not conditional in any manner, but is a straight assignment for a valuable consideration by said Marie Carrau to J. W. Robinson personally.

Thereafter testimony was taken as to certain claims upon said judgment for costs, a hearing was had upon the petition of appellant Robinson, and after the testimony was taken the District Court filed the memorandum decision July 6th, 1909. (R., pp. 6-8).

In this the court says:

"To reach an equitable adjustment, the court directs that Robinson shall have a right to control proceedings for collecting the judgment, as, under the statute, if any execution is necessary, it must be issued in his name. The money, when collected, shall be applied to repayment of the amount actually loaned by Russell, with accrued interest, as provided in the two written contracts signed by Marie Carrau, dated respectively April 7, 1902, and April 19, 1902, *and the surplus, if any, to be divided equally between Hays and Robinson.*"

Nowhere is Robinson named therein as stakeholder, trustee, or anything of a similar nature. The assignment of the judgment was to Robinson personally. By reason of that assignment he was considered the proper party by the court to enforce the collection of the judgment for costs and after collecting the same a certain portion thereof was awarded to him personally.

Thereafter, on October 15, 1909, execution of said judgment for costs was issued, as directed, at the request of said J. W. Robinson. Thereafter, a petition was filed by said Robinson seeking modification of the said memorandum decision heretofore referred to (R., pp. 8-12). After considering the same, the said District Court denied it in part and signed and filed an order of distribution on January 24, 1910 (R., pp. 16-17). The order of distribution says:

"And the clerk of this court is hereby directed to distribute and pay over to the parties or their attorney the moneys derived under execution for costs herein, now in the registry of this court, in accordance with the terms and provisions of the decision of this court filed herein on the 6th day of July, 1909."

It is provided, however, in said order that in addition to the provisions of said memorandum decision referred to, the clerk was to retain witness fees as taxed.

Thereafter said Russell and Hays drew the money awarded to them from the registry of the court. On January 28, J. W. Robinson secured from the said District Court an order to show cause, a portion of which is as follows (R., p. 24):

"It is now ordered that W. M. Russell and W. F. Hays each repay into the registry of this court the sum, for Russell of seventeen hundred ninety dollars ($1,790.00), and the sum for Hays of four hundred ninety-six and 33/100 dollars (496.33), or show cause before this court on February 28, 1910, at the Federal court room at 10 o'clock A. M., why they should not be required to do so and why the said fund *should not remain in the registry of the court during the pendency of a proceeding to review said decision with reference to the distribution of said fund.*"

Thereafter, the said J. W. Robinson perfected his appeal. On the 10th day of May, 1910, after said appeal aforesaid had been perfected, said J. W. Robinson, on his own *ex parte* application, without notice or to the knowledge of the appellees, secured an order from the said District judge, which is as follows (Sup. R., p. 143):

"The appeal herein relating to the validity of the lien of W. F. Hays having been perfected and the estimate of the costs in preparing the record on appeal to the United States Circuit Court of Appeals having been fixed by the clerk at eighty-six and 80/100 dollars (86.80), and it appearing to the satisfaction of the court that there is no reason why the

funds in the registry of the court, having been determined to belong to J. W. Robinson as assignee of said judgment, should not be used by said appellant in payment of the expenses of such appeal,

"It is now therefore ordered that the clerk of this court apply such portion of said funds now in the registry of the court *belonging to the said J. W. Robinson as may be necessary from time to time to meet his expenses incident to said appeal* and to charge said fund with such amounts."

'Dated at Seattle, Washington, May 10th, 1910.

"C. H. HANFORD, Judge."

ARGUMENT.

The law is well settled that one cannot accept the benefits of a decree or judgment, in whole or in part, and thereafter appeal from it. The following cases are cited:

Albright et al. vs. Oyster et al., C. C. A. 8th Circuit, 60 Fed. 664.

"We are of the opinion that the acceptance of this deed under the decree estopped the appellants from exercising any right of appeal they otherwise might have exercised. It was in receipt of a substantial benefit that they could not have obtained without the decree, and they ought not to be permitted to review the provisions of it with which they are not satisfied after deducting the benefit they have approved."

Chase vs. Driver, C. C. A. 8th Circuit, 92 Fed. 780-86.

"When the decree was entered he had the option to refrain from filing his bond and to appeal to this court for its reversal or modification, or to file his bond and accept the terms of the decree. He chose the latter alternative. He took the benefit of the sale offered him under the decree, which he had sought, and it is too late for him now to escape from the terms prescribed or the burdens imposed thereby. When he accepts the benefits of a decree or judgment, he is thereby estopped from reviewing it or from escaping from its burdens."

Darragh vs. Wetter Mfg. Co., C. C. A. 8th Circuit, 78 Fed. 7-10.

"After the property of the hardware company had been sold under the decree, and after the master had received the proceeds of the sale and on April 18, 1896, a hearing was had upon this petition of the appellant and the court found that the hardware company was indebted to him in the sum of $927.02; that the receiver had collected from the collateral pledged for the payment of his debt more than this amount, and ordered the master to pay him the $927.02 out of the moneys in his hand. The appellant accepted the payment, and it is upon this fact that the appellees base their motion for the dismissal of this appeal. It is sometimes the case that when he accepts benefits conferred upon him by a decree which he could not have secured without the decree, he cannot be subsequently heard to challenge it. He may not accept and select the advantageous terms of the decree and reject and successfully attack those that cause a burden upon him."

Bringham City vs. Toltec Ranch Co., C. C. A. 8th Circuit, 101 Fed. 85-89.

"When the verdict had been rendered, and the court had entered judgment against it for the possession of the entire 160 acres, the city had the option to refrain from conceding the validity of that adjudication, from paying the costs under it and the dollar assessed by the verdict as damages for the taking of the small tract which it sought to hold, and to sue out a writ of error to reverse that judgment, or to concede its correctness, take advantage of the verdict, pay the costs and damages, and procure the right to the property it sought by condemnation under the verdict. It chose the latter alternative. It took the benefit of the condemnation offered to it by the verdict of the jury and the judgment of the court, and it is now too late for it to escape from

the conclusions reached, or the burdens imposed thereby. One who accepts the benefits of a verdict, decree or judgment is thereby estopped from reviewing it or from escaping from its burdens."

Also see:

2 *Cyc.* 651, Note 71.

Robinson seeks to hide behind the statement that he is stake-holder or trustee for other persons whom he alleges have a right to a portion of said judgment for costs. We submit, however, that the assignment upon which the whole hearing was based is an assignment to him personally, the memorandum decision and the award and the order of distribution made thereon, each awards to him personally one-half of the remaining funds after the payment to W. M. Russell of the sum allowed him. The order which he obtained from the District Court, which he presented to the clerk of the court and upon which he drew down the sum therein mentioned and other additional sums amounting to between three and four hundred dollars (Sup. R., pp. 144-145), states:

"It is now therefore ordered that the clerk of this court apply such portion of said funds now in the registry of the court belonging to the said J. W. Robinson as may be necessary from time to time to meet his expenses incident to said appeal."

But even if he were trustee and stake-holder for other persons claiming an interest in said judgment, he nevertheless should not be permitted to appeal from the judgment after he had accepted the benefits of it, or that portion of the judgment at least which was favorable to him. That is what he did in this case. After the order of distribution had been signed and filed, Russell and Hays drew down the money awarded to them. Mr. Robinson thereupon secured a show cause order, ordering them to return the money into the registry of the District Court, to remain there during the pendency of his appeal, and immediately after perfecting his appeal he then drew down practically all of the money awarded to him. Instead of using money outside the registry of the court to pay his costs on appeal, he chose to use the money awarded him, and the mere fact that he secured the order of the District Court permitting him to do so does not relieve him from the fact that by so doing he accepted the judgment of the court and thereby waived his rights of appeal.

The orders of the court made upon the petition of the appellant Robinson are binding upon him and are not appealable.

2 *Cyc.* 650, Subdivision 2.

It is the universal rule that a party upon whose motion an order is made cannot appeal therefrom.

Storke vs. Storke, 111 Cal. 514;

The Matter of Radowick, 74 Cal. 536.

We respectfully submit that the appeal should be dismissed with costs.

W. F. HAYS,
REYNOLDS, BALLINGER & HUTSON,
Solicitors for Appellee.